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No. 80-389

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

COASTAL PETROLEUM COMPANY,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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## QUESTION PRESENTED

May the Court of Claims, a court with exclusive original jurisdiction and final jurisdiction (except for review by this Court) over "taking" claims of more than $10,000 against the United States, fail or refuse to follow *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), by holding that *Kaiser Aetna* was a ruling only as to "fast lands" (or analogous property) and did not apply to rights in submerged lands, thereby leaving unchanged the Court of Claims' legal "presumption" that a taking of rights in submerged lands is non-compensable by virtue of the Government's "navigation servitude," thus destroying the holding of *Kaiser Aetna* for substantial claimants in submerged land cases?

The United States built a levee on Lake Okeechobee, a huge lake in Florida which is a "navigable water of the United States." The bed of Lake Okeechobee contains limestone, which was the property of petitioner under a lease from the State of Florida. The limestone under and near the levee was rendered unavailable to petitioner; other limestone, elsewhere in the Lake, was quarried by the Government and used in the levee. The Court of Claims held, on motion for summary judgment, that there is a "presumption" of non-compensability for a taking by the Government, by virtue of its navigation servitude, of property beneath navigable waters; it applied this presumption to the taking of all the limestone involved here, and held it all non-compensable because it was (1) found in a "navigable water of the United States" and (2) used in a navigation project.

A timely motion for rehearing made after this Court's decision in *Kaiser Aetna v. United States* was denied

by the Court of Claims, on the ground that *Kaiser Aetna* was limited to "fast lands" (or analogous property) and had no application to property rights in submerged lands.

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Coastal Petroleum Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims that a taking by the United States, of limestone in which petitioner had a property interest, was non-compensable under the Fifth Amendment.

## OPINIONS BELOW

The opinion of the Court of Claims is reported at 207 Ct. Cl. 701, 524 F.2d 1206. It is reprinted in Appendix A hereto, p. 1a *infra.* A motion for rehearing by Coastal Petroleum Company was denied by the Court of

Claims by an Order issued on June 13, 1980; that Order is not reported, but is reprinted in Appendix B hereto, p. 11a *infra.*

## JURISDICTION

The opinion of the Court of Claims making the original decision in this case (on Count I of the complaint) was entered on October 22, 1975. An Order of that Court, extending the time within which a motion for rehearing might be filed by petitioner, extending the time to thirty days after Count II was decided, was entered on November 26, 1975. Count II has not yet been decided. On June 13, 1980, the Court of Claims issued its Order denying petitioner's motion for rehearing as to the decision of October 22, 1975.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1255(1).

## CONSTITUTIONAL PROVISION INVOLVED

***Fifth Amendment to the Constitution:***

> No person shall . . . be deprived of property without due process of law; nor shall private property be taken for public use without just compesnation.

## STATEMENT OF THE CASE

Petitioner Coastal Petroleum Company was the lessee, under a lease granted by the State of Florida, of the water bottoms of Lake Okeechobee, for the purpose of drilling for and producing therefrom all minerals of every type, including limestone. Beginning in 1965, the United States (through the Corps of Engineers) proceeded to construct a levee on Lake Okeechobee, and did so by ex-

cavating the bottom of the Lake, under and near where the levee was to be built. The bed of Lake Okeechobee contained limestone, which is a material used in the construction of levees, and the limestone excavated by the Corps of Engineers was in fact employed in the construction of the levee on Lake Okeechobee.

In addition to the limestone excavated from under and near the levee, limestone was also mined by the United States elsewhere in Lake Okeechobee, not because it was vital to the levee but simply because the limestone was useful for construction and was conveniently located in the Lake.

If the United States had not used the limestone it found in the bottom of Lake Okeechobee, the Corps of Engineers would have had to go out and purchase, on the open market, levee-bank construction material for the construction of the levee.

Lake Okeechobee is a "navigable water of the United States"; there is a navigable waterway running through it. The levee was authorized, however, as a flood control project.

Petitioner filed suit in the Court of Claims, alleging that in building and maintaining the levee, the United States (1) prevented petitioner from mining limestone under and near the levee, and (2) mined and used limestone from the bed of Lake Okeechobee, all of which limestone belonged to petitioner under its lease. These actions by the U..ited States, petitioner said, amounted to a Fifth Amendment taking of petitioner's property—both its right to mine, and the limestone itself.

Subsequently petitioner amended its complaint to add a separate count for the taking of limestone from another part of Florida, in the course of building the

Trans-Florida Barge Canal. This was denominated as Count II; the Lake Okeechobee portion of the complaint was denominated as Count I.

The United States moved for summary judgment as to Count I on two grounds, one of which was that any "taking" of petitioner's property was non-compensable by virtue of the navigation servitude enjoyed by the United States. On October 22, 1975, the Court of Claims issued a decision granting the Government's motion for summary judgment as to the Lake Okeechobee claim, solely on the ground of the navigation servitude.

In its decision, the Court of Claims held that although the levee was primarily a flood control project, it also served a navigation purpose and therefore the levee project "is entitled to the benefits of the navigation servitude" (524 F.2d at 1210, p. 7a, *infra*). The Court said that "Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters" but where there is "no ascertainable Congressional intent" to pay compensation

> the presumption is that Congress intended to exercise both its navigation power and the navigation servitude. 524 F.2d at 1210, p. 7a, *infra*.

The Court went on to say that it found nothing to persuade that Congress, despite its power to use the submerged property without compensation, "desired to make payment to the owners."

As to petitioner's two distinguishable claims—one for deprivation of the right to mine under and near the levee, the other for limestone mined by the Government elsewhere in the Lake—the Court of Claims held that

while the application of the navigation servitude "is less clear as to the limestone mined elsewhere in the Lake," 525 F.2d at 1211, p. 8a, *infra*, yet the taking of that limestone, too, was non-compensable. That limestone, said the Court, was found in the "very same navigable water"; it was used in the levee project; and that use, therefore, "was authorized as part of and directly incident to the main work. No payment had to be made . . . . That the United States might have received some commercial . . . benefit from use of the limestone does not reduce the extent of the navigation servitude." 524 F.2d at 1212, p. 9a, *infra*.

Petitioner had argued to the Court of Claims that summary judgment was entirely inappropriate here, and that the matter should not go off on the papers, but instead there should be a trial to determine the purpose and intent of Congress in authorizing the Lake Okeechobee project, and to adduce evidence on the actions of the Government in mining and using the limestone. The Court nevertheless went ahead on the basis of summary judgment, saying (footnote 7, 524 F.2d at 1212, p. 10a, *infra*):

> Plaintiff has challenged the appropriateness of summary judgment, contending that there should be a trial to ascertain the purposes and scope of the Lake Okeechobee project, as well as of the circumstances surrounding the Government's use of the limestone. We think, however, that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice. Plaintiff does not present enough to raise any factual issue which should be tried.

Following the issuance of the Court's decision on October 22, 1975, petitioner moved for rehearing, ex-

plaining to the Court that the same issue of navigation servitude appeared to be involved in Count II of the complaint, and asking the Court's assistance in holding up any possible finality of the decision for certiorari purposes. The Court of Claims acceded to petitioner's request by issuing an Order on November 26, 1975, treating the motion for "rehearing" as a motion to extend the time for filing a motion for rehearing until 30 days after the disposition of Count II—and as so reframed, the motion was granted. Consequently, the time for moving for rehearing or reconsideration of the decision of October 22, 1975, remained open.

Count II has not yet been determined. But on December 4, 1979, this Court issued its decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, a decision which in the opinion of petitioner completely undermined the holding of the Court of Claims in its decision of October 22, 1975, particularly as to (1) the "presumption" that a taking is always non-compensable unless Congress has manifested an affirmative intention to pay compensation, and (2) the position that such a matter could be determined on summary judgment, without a trial, without developing the evidence as to the purposes of the levee project, the intentions of Congress in authorizing it, or the actions of the Government in appropriating and using the limestone. *Kaiser Aetna* had said, 444 U.S. at ___, 100 S. Ct. at 390, that compensability and the "taking" question had always been examined by this Court –

> by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental actions—that have particular significance.

Accordingly, petitioner on March 4, 1980, filed a Motion for Rehearing or Reconsideration of Decision on Count I. The Government responded. On June 13, 1980, the Court of Claims issued an Order, reprinted as Appendix B *infra* (p. 11a), denying petitioner's motion. The reason for the denial was that, as stated by the Court of Claims, "we do not view the *Kaiser Aetna* decision as affecting our earlier ruling of October 22, 1975" (p. 12a). The sole ground for this opinion of the Court of Claims was that it believed the *Kaiser Aetna* decision involved only "fast lands" (or analogous property) and did not pertain at all to submerged land or property rights in submerged land. Since the instant case involves only minerals in submerged lands beneath navigable waters, the Court of Claims said, *Kaiser Aetna* was not relevant.

The Court of Claims thus did not view *Kaiser Aetna* as a case of general significance in the "taking" field; it did not regard *Kaiser Aetna* as an across-the-board pronouncement of this Court; it did not consider *Kaiser Aetna* a landmark decision. The Court of Claims felt free to disregard *Kaiser Aetna* on the ground that it was limited to "fast lands" (and even there, it is clear, the Court did not consider *Kaiser Aetna* to be particularly important).

The Court of Claims did not discuss, in its Order of June 13, 1980, the appropriateness of summary judgment procedure in the light of the "ad hoc, factual inquiries" which this Court in *Kaiser Aetna,* 444 U.S. at ___, 100 S. Ct. at 390, described as the method for examining the compensability question in a "taking" case.

## REASONS FOR GRANTING THE WRIT

The Court of Claims is the only court in this country in which a claim for money damages in excess of $10,000 in amount, for a "taking" by the United States, may be brought. *See* the Tucker Act, 28 U.S.C. 1491, 28 U.S.C. 1346(a)(2) (District Courts have concurrent jurisdiction only up to $10,000). That Court is thus, as it has been termed in the title of an article, "A Unique National Court." *See* 53 A.B.A.J. 1025 (1967). The jurisdiction of that Court for claims of over $10,000 is exclusive, it is original, and, except for review by this Court, it is final.

If the Court of Claims has mistaken the impact of a decision of this Court on the "taking" issue, or has in effect refused to follow a decision of this Court on that issue, it is a matter that cannot be corrected by any other court, for petitioner or for the many litigants who will follow us. Only this Court can remedy such a situation.

The importance of the issue is shown by two factors:

(1) A "taking" is a Constitutional matter. The Fifth Amendment provides that private property shall not "be taken for public use without just compensation."

(2) The magnitude of the claims involved here is huge. We are speaking of claims in the many millions of dollars. Those claims are doomed by an erroneous interpretation, by the Court of Claims, of the Constitutional requirements laid down by this Court.

That is the situation presented in this case. The Court of Claims has failed to follow, or has refused to follow, the dictates of this Court's towering decision in *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S. Ct. 383, handed down on December 4, 1979. In *Kaiser Aetna,* this Court stripped the words "navigation servitude"

and "navigable water of the United States" of the mystical quality, the aura of absolutism, that had been imparted to them by the Government—and by many lower federal courts—in recent years. The Court of Claims, however, has interpreted the *Kaiser Aetna* decision as limited to "fast lands" (or analogous property) and as entirely inapplicable to property rights in submerged lands beneath navigable waters, and therefore refused to apply the principles of *Kaiser Aetna* to the present case.

In its Order of June 13, 1980, denying petitioner's motion for rehearing or reconsideration based on the impact of *Kaiser Aetna,* the Court of Claims said that the *Kaiser Aetna* decision "discussed prior cases involving 'fast lands,' and analogized the interest of Kaiser Aetna *et al.* in the developed Pond 'to that of owners of fast land adjacent to navigable waters'." The Court of Claims then said of *Kaiser Aetna*:

> But the Court did not reconsider, change, or modify the pre-existing law as to submerged land beneath concededly navigable waters or the use of such submerged land in connection with an exercise of the navigation servitude. (*See* Appendix, p. 12a, *infra.*)

Implementing this, the Court of Claims said (p. 13a, *infra*):

> Our decision of October 22, 1975, *infra,* dealt only with minerals in submerged lands beneath navigable waters, waters which were plainly subject to the navigation servitude; the minerals involved were used for a levee project which was itself covered by that servitude, or the minerals could not be used by plaintiff without interfering with the project.

Accordingly, the Court of Claims swept all petitioner's claims, even the claim for the Government's mining of limestone in portions of Lake Okeechobee elsewhere than in the area of the levee,[1] into the non-compensable category. That Court, then adhered to the "presumption" it laid down in its decision of October 22, 1975, that there is to be no compensation for the taking of submerged property rights unless Congress has affirmatively manifested an intention that compensation should be paid. 524 F.2d at 1210, p. 7a, *infra.*

That "presumption," which is destroyed by the *Kaiser Aetna* formula of ad hoc inquiry into the nature of the "taking" transaction, *see* 444 U.S. at ___, 100 S. Ct. at 390, becomes the more ludicrous when applied to the limestone quarried by the Government elsewhere than in the area of the levee. Under no circumstances could Congress have foreseen that the Corps of Engineers would find a large body of limestone in the bed of Lake Okeechobee, and would appropriate that limestone for use in building the levee. It cannot be "presumed" that Congress would have desired to deprive the owner of the purchase price of that limestone, since the normal, the routine, expectation of the Congress is that the Government will have to purchase its construction materials on the open market.

But the Court of Claims said that *Kaiser Aetna* applied only to "fast lands or analogous property," not to property rights in submerged lands. As to submerged lands, the Court of Claims said, it is sufficient that (1)

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[1]The Court of Claims, in its decision of October 22, 1975, had expressly said: ". . . we have considered the case on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area." Footnote 6, 524 F.2d at 1211; p. 8a, *infra.*

the levee was a navigation project for Lake Okeechobee, (2) the limestone was all located in Lake Okeechobee, and (3) the limestone was used for the levee. In short, the ancient mystique of the "navigation servitude" was revived by the Court of Claims as to rights in submerged lands.

This is exactly what *Kaiser Aetna* has knocked out—the idea that *anything* done by the Government within "navigable waters" may be done without compensation, if it somehow relates to the navigation project. *Kaiser Aetna* called for "ad hoc, factual inquiries" as to the character of the Government's action, the reasons for it, the "interference with reasonable investment backed expectations," etc. 444 U.S. at ___, 100 S. Ct. at 390. *This was not said with reference to "fast lands"*; it precedes any reference to "fast lands" in the *Kaiser Aetna* opinion. It was said in the course of a general examination of the "navigation servitude." This Court there pointed out, quoting from a prior decision, that it has generally been

> "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." *Ibid.*

The *Kaiser Aetna* decision had earlier said, 444 U.S. at ___, 100 S. Ct. at 388, that the position of the Court of Appeals in that case "presumes that the concept of 'navigable waters of the United States' has a fixed meaning that remains unchanged in whatever context it is being applied." Refuting this thesis, which accords with the position of the Court of Claims here as to rights in "submerged lands," this Court said that the law on this matter "cannot simply be lumped into one basket."

There must be a "careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case. *Ibid.* This Court "has never held," said the *Kaiser Aetna* opinion, "that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." 444 U.S. at ___, 100 S. Ct. at 389.

It was following these statements of general applicability, and preceding any mention of "fast lands," that this Court said that it has examined the "taking" question "by engaging in essentially ad hoc, factual inquiries" that have identified factors of particular significance in the case.

Subsequently, the Court said, as the Court of Claims noted in its Order of June 13, 1980, p. 13a, *infra,* that the title of an owner in certain submerged lands is "not as full and complete as his title to fast land which has no connection with the navigation of such waters." 444 U.S. at ___, 100 S. Ct. at 390-1. That may be, but in no way does this say that there is a blanket exception for submerged lands, or imply that the "ad hoc, factual inquiries" into the Governmental action should not be made. In the instant case, for example, there is an obvious difference between the limestone under and near the levee, necessary to the underbearing of the levee, and the limestone taken from elsewhere in the Lake. Possibly different treatment would result, depending on the result of the inquiries.

It was thus wrong for the Court of Claims, acting on a motion for summary judgment, without a trial, without a hearing of any kind, without an examination of the factors identified by this Court in *Kaiser Aetna,* to hold that all the actions of the Government here

were non-compensable by virtue of the "navigation servitude." In refusing to reconsider its decision in the light of *Kaiser Aetna,* and in limiting that decision to "fast lands" or analogous property, the Court of Claims has taken a stand which ought to be corrected now, before further damage is done. Many millions of dollars in claims may be affected.

Respectfully submitted,

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APPENDIX A

# In the United States Court of Claims

No. 309–72

(Decided October 22, 1975)

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## COASTAL PETROLEUM COMPANY v. THE UNITED STATES

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*Irving R. M. Panzer*, attorney of record, and *E. Michael Paturis*, for plaintiff. *C. Dean Reasoner* and *Reasoner, Davis & Vinson*, of counsel.

*Irwin L. Schroeder*, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant.

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Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

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ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

This is a tussle over some limestone at the bottom of Lake Okeechobee in Florida. Plaintiff Coastal Petroleum Company, claiming a compensable interest in the limestone through a lease from an organ of the State of Florida, says that the United States took the mineral without paying for it. The defendant, for its part, asserts, first, that plaintiff has no such compensable interest, and, second, that in any event the Federal Government had the right to use the limestone under its navigation servitude which it exercised in the Lake Okeechobee project. Defendant has moved for summary judgment on this portion of the petition.[1]

[1] Count II of the petition asserts a separate claim under another lease for the taking of limestone in another part of Florida, in the course of the building of the Trans-Florida Canal. That count is not now before us.

For the purposes of this motion, plaintiff is conceded to be the lessee of a valid mineral-drilling lease, granted by the Trustees of the Internal Improvement Fund of the State of Florida, originally let in 1944, modified in 1947 and renewable for five-year terms.[2] This document, Drilling Lease No. 248, grants plaintiff "[a]ll those water bottoms lying within the boundaries of Lake Okeechobee * * * for the purpose of drilling for and producing therefrom oil, gas, sulphur, casinghead gas and casinghead gasoline * * *." Florida has held this lease to cover all minerals.[3]

In 1965, the United States acquired from the Central and Southern Florida Flood Control District two easements covering at least part of the same land covered by the Coastal lease, for the purpose of "construction, maintenance and operation" of the levees on Lake Okeechobee authorized by the Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1176.[4] The easements granted the United States by the Flood Control District had previously been conveyed to the District by Coastal's lessor, the Florida Internal Improvement Fund, in order to pass them on to the United States. The easements specifically allowed the United States to "dig, excavate or otherwise construct artificial channels or waterways" and to "erect or construct levees and/or dikes." [5]

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[2] There is now pending in the Fifth Circuit a case challenging on state grounds the existence and validity (after 1964) of plaintiff's leases from the Internal Improvement Fund. The Fifth Circuit has referred the issue to the Supreme Court of Florida. *See infra*. The United States reserves the right to attack the lease on that state ground if its present motion is denied.

[3] In a 1960 decision as to which certiorari was discharged by the Florida Supreme Court, 125 So. 2d 300, the District Court of Appeals of Florida for the First District determined that the lease included drilling rights for all minerals defined in the broadest sense. *Collins* v. *Coastal Petroleum Co.*, 118 So. 2d 796, 803 (Fla. Dist. Ct. App. 1960). As a decision on the point by an intermediate state court, which the highest court refused to review, this ruling is binding on us, *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 467 (1940), and we assume that Coastal's drilling rights included the right to mine limestone.

[4] The authorizing statute is short and does not contain a description of the project. However, it incorporates by reference the *Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No.* 643, 80th Cong., 2d Sess. (1948), which described the program in some detail, and includes plans for "a low levee * * * around the lake shore from the St. Lucie Canal northward to tie in with the present north shore levee." *Ibid.* at 40. The construction of that levee precipitated this suit.

[5] The easement provided that the Government did not acquire any right or interest "in and to any such spoil and spoil materials as may be excavated, dredged or otherwise removed from the hereinafter described lands, except

In the middle or late 1960's, the Corps of Engineers commenced construction of the levee on Lake Okeechobee. It was built "by digging a borrow pit and placing the excavated material on the lake side of the borrow pit." Affidavit of C. W. Pritchett, dated April 14, 1975. In 1968 Coastal filed a suit in the U.S. District Court for the Southern District of Florida in which the company attempted to obtain a mandatory injunction requiring the Corps to issue Coastal a permit to mine limestone in the lake. The permit had been denied because state and local authorities, who were joined as defendants, refused to support the application, largely for environmental reasons. Coastal asked in the alternative for a decree on behalf of either the federal or state defendants condemning its property in either the lease or the minerals and granting compensation. In addition, Coastal asked compensation, against any defendant, for a taking of limestone mined by the Corps and used for the levee. The District Court refused on public policy grounds to grant the injunction, but found that the refusal to grant a permit had worked a taking by the state agencies and that Coastal was entitled to lost profits. *Coastal Petroleum Co.* v. *Secretary of the Army*, 315 F. Supp. 845, 850 (S.D. Fla. 1970). The court did not decide whether there had also been a taking by the federal defendants, because the issue was at that time before the Fifth Circuit in another case. In July, 1970, the Fifth Circuit decided in *Zabel* v. *Tabb*, 430 F. 2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), that a refusal by the Corps of Engineers to grant a permit (there, to fill a bay) because the project would have adverse environmental, rather than navigation, effects, was a proper exercise of federal power under the Commerce Clause and, additionally, because of the navigation servitude, did not work a taking of any property rights of the owners of the bed of the bay and land riparian to it. *Ibid.* at 214, 215.

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for such excavated materials required for the Project Works hereinabove referred to * * *." The reason for this provision is unclear (it may have been designed to keep the United States from having to dispose of the spoil material), and the parties have not provided us with any information on the intent of either the Government or the Flood Control District. Both parties seem to agree, though, that the limestone is not "spoil" or "spoil material." In that event, the easement says nothing about title to it, although the existence of the proviso suggests that the United States was granted some rights to use materials found in the easement area.

Reacting to *Zabel*, the District Court on October 6, 1970. reversed its earlier decision on the taking issue, and declared that "the federal defendants had the right to deny plaintiff's application to mine in the 5.7 acres applied for, and therefore there was no taking of plaintiff's property in the 5.7 acres." Order, Nos. 68–951–Civ–CA and 69–699–Civ-CA (S.D. Fla. Oct. 6, 1970). The court asked for further briefs on whether the federal defendants should be dismissed or the case transferred to the to the Court of Claims, evidently on the view that the District Court did not have jurisdiction to declare an inverse condemnation of plaintiff's property if the amount exceeded $10,000. *See* 28 U.S.C. §1346 (a)(2). In a memorandum decision and order dated February 5, 1971, the District Court dismissed the suit as against the federal defendants, and found that, as a matter of state law, Coastal had acquired by its lease no compensable property right to the minerals in Lake Okeechobee prior to the time they were mined, and that therefore the state defendants were not liable to Coastal for any taking by virtue of their having granted the United States the easement to build the levee. Coastal did not appeal either the decision dismissing as against the federal defendants or the determination that its ownership rights under the leases were limited to minerals already mined. The state defendants appealed the court's separate holding that Coastal's lease was currently valid under Florida law.

Following the District Court decision, however, Coastal filed suit in this court alleging that in building and maintaining the levee, the United States (1) prevented Coastal from mining limestone under and near the levee and (2) mined and used limestone from the bed of Lake Okeechobee, which limestone belonged to Coastal, all of which amounted to a Fifth Amendment taking of plaintiff's property—both the right to mine and the minerals themselves. Because the Fifth Circuit, as a result of the appeal by the state defendants in the District Court case, has before it the issue of the validity of Coastal's leases from 1964 to the present (including the period during which the levee was built), proceedings in this case were stayed awaiting decision on that issue. The Fifth Circuit has certified the question to the Florida

Supreme Court, which appears unlikely to respond in the near future.

Defendant now contends, in its motion for summary judgment, that the case can be disposed of in its favor, without considering the validity of the lease under state law, on either of two grounds—that Coastal is collaterally estopped from asserting its ownership of unmined minerals by the unappealed decision in the District Court case or that any "taking" is non-compensable by reason of the navigation servitude. Coastal replies that, since the federal defendants were dismissed from the District Court suit for lack of jurisdiction, the doctrine of mutuality prevents the Government from now relying on the decision with respect to the scope of the lease in favor of the state defendants in that case. Coastal also says that the Lake Okeechobee project was a flood control project, rather than an action in aid of navigation, that Congress recognized this, and that therefore the navigation servitude does not apply.

We need not now consider whether plaintiff is collaterally estopped by the District Court's ruling that under Florida law the lease gives it no compensable interest in the limestone in place because we are satisfied that, in any event, the United States can use that limestone, as it has, as part of the exercise of its navigation servitude.

The latter privilege reserves to the Federal Government a dominant interest in all submerged property within navigable waters, up to the low mean high water mark. *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596–97 (1941). This navigation servitude is an extremely old concept—owners of property or property rights within navigable waters take those rights fully cognizant of their limited nature. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Gibson* v. *United States*, 166 U.S. 269 (1897). Plaintiff has admitted in answer to defendant's interrogatories that all the minerals about which it complains (in this part of its petition) were located below mean high water. Answers of Coastal Petroleum Co. to Interrogatories of Defendant ¶10. Coastal attempts, however, to take the case outside the navigation servitude by pointing out, as one of its points, that the limestone may not all have been

taken "from the navigable waterway of the United States that runs through Lake Okeechobee." *Ibid.* The short answer to this contention is that "[t]he navigation easement is not limited to the thread of the stream where vessels pass, but extends from ordinary high water on one side to ordinary high water on the other." *Allen Gun Club* v. *United States*, 180 Ct. Cl. 423, 429 (1967). Where applicable, the servitude covers the whole of the water found to be navigable, not merely the channel actually used.

The main argument for plaintiff is that the right of the United States to take or use such submerged property is limited to actions in aid of navigation, but that the work here was for flood control, rather than to aid navigation. The categories are not so distinct. In *Allen Gun Club* v. *United States*, *supra*, we held that flood control projects on the Mississippi and its source streams were also, because of the disastrous effects flooding has on navigation, projects in aid of navigation and that the navigation servitude therefore applied. 180 Ct. Cl. at 429–30; *see United States* v. *Twin City Power Co.*, 350 U.S. 222, 223–24 (1956); *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 231–33 (1960); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391–93 (1945); *cf. Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525–26 (1941). The statute under which many flood control undertakings, including the Central and Southern Florida Flood Control Project, are auized states that the projects are "for the benefit of navigation and the control of destructive floodwaters and other purposes." Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1175. Such a declaration has consistently been held conclusive to determine the navigation purpose of a project. *United States* v. *Grand River Dam Authority*, *supra* at 232, and cases cited therein; *United States* v. *Twin City Power Co.*, *supra* at 224, and cases cited. Furthermore, the particular action which forms the basis of this suit, the construction of the Lake Okeechobee levee, was included in the project in large part because of the benefits it would provide for navigation on the Intracoastal Waterway, and this was one of the few parts of the project over which the Federal Government retained control after construction. H.R. Doc. No. 643, 80th Cong.,

2d Sess. 8, 36–37, 41, 49, 53 (1949). We hold, therefore, that the project involved here is entitled to the benefits of the navigation servitude.

Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters for actions which, like those to which the servitude is applicable, are grounded in the power of the Federal Government to regulate commerce. *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950); *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254–56 (1954). But where a project has a legitimate navigation purpose, and there is no ascertainable Congressional intent to pay compensation, the presumption is that Congress intended to exercise both its navigation power and the navigation servitude. *United States* v. *Twin City Power Co.*, *supra*, 350 U.S. at 225; *United States* v. *Kansas City Life Ins. Co.*, *supra*, 339 U.S. at 808 (decided the same day as *Gerlach*); *United States* v. *Rands*, 389 U.S. 121, 122–24 (1967). That presumption is strengthened here by the proviso in the statute authorizing the project that "nothing herein shall impair or abridge the powers now existing in the Department of War with respect to navigable streams * * *" Act of June 22, 1936, ch. 688, § 3, 49 Stat. 1571; *see* Act of June 30, 1948, ch. 771, § 201, 62 Stat. 1175. We find nothing to persuade that Congress, despite its traditional right to use the submerged property without compensation, desired to make payment to the owners.

To say the navigation servitude applies to the Lake Okeechobee project needs, however, to be further refined. Coastal makes two distinguishable claims—one relating to its inability to mine under and near the levee and the other concerning the use of limestone mined by the United States in building the levee. Once we have determined that the navigation servitude applies to this project, it is obvious that Coastal need not be compensated for loss of its right to take the stone under and near the levee. Such mining would in all probability have destroyed the levee either directly or by weakening the subsurface structure. Since any right to mine was subservient to the use of the property by the Federal Government in aid of navigation, the Corps of Engineers

could, without compensation, preempt use of the lake bottom to support the levee rather than allow it to be used for mining.

While the application of the navigation servitude to limestone mined by the Government elsewhere than in the borrow pit for use in the levee is less clear,* we believe that the principle of *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945), requires a decision for defendant. In that case, the United States, to provide better landing facilities for sea planes based at the Hampton Roads Naval Operating Base, dredged Willoughby Bay, a navigable waterway, to a depth of 10 to 15 feet below mean low water. The dredged material was used to enlarge the shore facilities of the Base by placement at the mouth of Mason Creek, thereby destroying the navigability of that water. *Ibid.* at 389. Commodore Park owned fastlands on Mason Creek, and sued for a taking of that part of the value of its land which was based on its fronting on a navigable waterway. *Ibid.* at 387–88. The District Court found that neither the dredging nor the filling of Mason Creek had any relation to navigation, and granted compensation. The Fourth Circuit Court of Appeals affirmed, holding that while the dredging was related to navigation, the fill, which had caused the damage, was not. *Ibid.* at 388, 391. The Supreme Court reversed on two main grounds.

First, the Court found that there was no property interest owned by Commodore Park in the flow of Mason Creek, a finding which is irrelevant to this case as we now decide it.

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* Defendant's position is murky as to whether limestone from outside the borrow pit was used in constructing the levee. In its answer to Coastal's petition, defendant appeared to admit that substantial quantities of limestone from the lake bed were used in the construction. Answer ¶9; *see* Answer to First Amended Petition ¶9. On the other hand, in its latest submission, the affidavit of Construction Branch Chief C. W. Pritchett, defendant seems to imply that the only limestone taken from the lake bed was taken when the borrow pit, because of the irregularity of the lake shore, entered the lake. Affidavit of C. W. Pritchett ¶¶4, 5; Note 1 to Map entitled Levee 47–Section 1, Plan and Sections, submitted with affidavit. If this later explanation is correct, the servitude would clearly bar recovery since the borrow pit was an integral part of the levee and water control system. However, given the requirement that we view the facts most favorably to plaintiff on defendant's motion for summary judgment, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), and the uncertainty of defendant's response, we have considered the case on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area.

The Court then went on to find that the filling of Mason Creek was covered by the navigation servitude even though it impeded, rather than aided, navigation, and even though the project was on a distinct, though connected, body of water from the Bay where dredging in aid of navigation occurred. *Ibid.* at 392–93. It was the total project, not individual pieces of it which Congress, through the War Department, had determined to be in aid of navigation—and that judgment, invoking the navigation servitude, was not to be disturbed. *Ibid.* at 392.

We think the same reasoning is applicable here. The Lake Okeechobee project must be considered as authorized as a whole, for construction as found proper by the Corps of Engineers. When the Corps decided (if it did, *see* note 6 *supra*) to use limestone found below mean high water within the navigable waters in order to build the levee, there was "not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained resulted not from a taking of the * * * owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject." *United States* v. *Chicago, M., St. P. & P. R.R.*, *supra*, 312 U.S. at 597. So long as the limestone was employed for the levee project—which was itself plainly covered by the navigation servitude—that use of submerged minerals below the high water mark of the very same navigable water was authorized as part of and directly incident to the main work. No payment had to be made. "[T]he Congress, and those to whom it has delegated authority, may, without Fifth Amendment liability, employ land submerged under navigable water in the way that in their best judgment helps to accomplish the overall purpose even if, intentionally or not, they impair navigation for some purposes in some areas." *Allen Gun Club* v. *United States*, *supra*, 180 Ct. Cl. at 430. That the United States might have received some commercial, rather than military (as in *Commodore Park*, *supra*), benefit from use of the limestone does not reduce the extent of the dominant interest. *See United States* v. *Rands*, *supra*; *United States* v. *Twin City Power Co.*, *supra*.

The defendant's motion for summary judgment is granted [7] and Count I of the petition is dismissed. The case is remanded to the trial division for appropriate proceedings on Count II.

[7] Plaintiff has challenged the appropriateness of summary judgment, contending that there should be a trial to ascertain the purposes and scope of the Lake Okeechobee project, as well as of the circumstances surrounding the Government's use of the limestone. We think, however, that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice. Plaintiff does not present enough to raise any factual issue which should be tried.

## APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

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No. 309-72

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[Filed: June 13, 1980]

COASTAL PETROLEUM COMPANY

v.

THE UNITED STATES

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**Rehearing denied of decision of October 22, 1975, 207 Ct. Cl. 701, 524 F.2d 1206; inapplicability of Supreme Court decision in *Kaiser Aetna v. United States*, Dec. 4, 1979.**

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*Carroll J. Reasoner,* attorney of record, for plaintiff. *C. Dean Reasoner* and *Irving R. M. Panzer,* of counsel.

*John E. Lindskold,* with whom was *Assistant Attorney General James W. Moorman,* for defendant.

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Before DAVIS, *Judge,* Presiding, COWEN, *Senior Judge,* and NICHOLS, *Judges.*

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## ORDER

Plaintiff moves the court for rehearing or reconsideration of its decision in this case of October 22, 1975, 207 Ct. Cl. 701, 524 F.2d 1206, on the ground that the decision of the Supreme Court in *Kaiser Aetna v. United States,* U.S. Sup. Ct. No. 78-738, decided December 4, 1979, 48 U.S.L.W. 4045, "has completely undermined the basis for this Court's ruling, which was directed to Count I of the petition."[1]

We deny the motion for rehearing or reconsideration because we do not view the *Kaiser Aetna* decision as affecting our earlier ruling of October 22, 1975. The Supreme Court's case involved Kuapa Pond, a shallow privately-owned lagoon separated by a barrier from navigable waters, which was later developed by the owners and made accessible to navigable water by a lawful, man-made breach in the barrier. In holding that the Federal Government could not open the Pond to the public (after it had been made freely accessible by Kaiser Aetna et al. to navigable waters) without paying just compensation, the Supreme Court discussed prior cases involving "fast lands", and analogized the interest of Kaiser Aetna et al. in the developed Pond "to that of owners of fast land adjacent to navigable water." But the Court did not reconsider, change, or modify the pre-existing law as to submerged land beneath concededly navigable waters or the use of such submerged land in connection with an exercise of the navigation servitude. Indeed, the Court quoted, at length

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[1] Plaintiff's motion is timely under Rule 151 because, by order of November 26, 1975, the court extended plaintiff's time for filing a petition for rehearing "until thirty (30) days after the court finally disposes of Count II of the petition." Count II has not yet been disposed of.

and without any sign of disapproval, from *Scranton v. Wheeler,* 179 U.S. 141, 163 (1900), that "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a mere technical title, not at his disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

Our decision of October 22, 1975, *supra,* dealt only with minerals in submerged lands beneath navigable waters, waters which were plainly subject to the navigation servitude;[2] the minerals involved were used for a levee project which was itself covered by that servitude, or the minerals could not be used by plaintiff without interfering with the project. In holding that plaintiff was not entitled to compensation for the minerals, we relied on decisions of the Supreme Court and of this court laying down the same principle as stated in the quotation from *Scranton v. Wheeler* which the Supreme Court included in its *Kaiser Aetna* opinion.

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[2]We said in our decision (207 Ct. Cl. at 708, 524 F.2d at 1209) that "Plaintiff has admitted in answer to defendant's interrogatories that all the minerals about which it complains (in this part of its petition) were located beneath ordinary high water." There may be some attempt in the present motion for rehearing or reconsideration to retreat from that position, but if so that change comes too late.

Accordingly, the motion for rehearing or reconsideration of the court's decision on Count I is denied.

BY THE COURT

/s/ Oscar H. Davis
Judge, Presiding

Supreme Court, U.S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

No. 80-389

# In the Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL PETROLEUM COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTION PRESENTED

Whether this Court's decision in *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), required the Court of Claims to modify its holding that petitioner is not entitled to compensation under the Fifth Amendment because the United States exercised its navigational servitude in navigable waters.

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## OPINIONS BELOW

The opinion of the Court of Claims granting the government's motion for summary judgment and dismissing Count I of petitioner's complaint (Pet. App. 1a-10a) is reported at 524 F. 2d 1206. The order of the Court of Claims denying petitioner's motion for rehearing (Pet. App. 11a-14a) is unreported.

## JURISDICTION

The judgment of the Court of Claims dismissing Count I of petitioner's complaint was entered on October 22, 1975. Subsequently, the Court of Claims extended the time within which petitioner could seek rehearing on Count I until 30 days after the court's decision on Count II. Although Count II is still pending, petitioner sought rehearing on March 4, 1980, on the ground that this Court's decision of December 4, 1979, in *Kaiser Aetna* v. *United States,* 444 U.S. 164, required the Court of Claims to modify its decision. The motion for rehearing was denied by the Court of Claims on June 13, 1980. The petition for a writ of certiorari was filed on September 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## STATEMENT

Petitioner is authorized by lease with the State of Florida to extract minerals from the bed of Lake Okeechobee. See *Collins* v. *Coastal Petroleum Co.,* 118 So.2d 796 (Dist. Ct. App. 1960). Lake Okeechobee is a navigable water of the United States. See *Coastal Petroleum Co.* v. *Secretary of the Army,* 315 F. Supp. 845, 846 n.1 (S.D. Fla. 1970). A large portion of the bed of the lake consists of limestone.

The Corps of Engineers, in the exercise of its authority over navigable waters pursuant to 33 U.S.C. 403,[1] has refused to issue to petitioner a permit to extract limestone from the lake.[2] At the same time, according to petitioner, the Corps itself took limestone from the lake and used it for the construction of a levee authorized to be built in the lake by the Act of June 30, 1948, ch. 771, Section 203, 62 Stat. 1175.[3]

In 1974, petitioner initiated the present lawsuit in the Court of Claims. Count I of the complaint alleged that the actions of the Corps of Engineers in using limestone obtained from the bed of the lake for the construction of the levee, and in preventing petitioner from mining limestone in the vicinity of the levee, constituted a taking for which compensation was due. Count II of the

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[1]This statute provides in pertinent part that "* * * it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

[2]In 1968, petitioner filed suit in the United States District Court for the Southern District of Florida to obtain a mandatory injunction requiring the Corps to issue a permit to mine limestone in the lake (Pet. App. 3a). On October 6, 1970, the district court held that " 'the federal defendants had the right to deny [petitioner's] application to mine in the 5.7 acres applied for, and therefore, there was no taking of plaintiff's property in the 5.7 acres' " (Pet. App. 4a). Petitioner did not appeal from the district court's decision.

[3]It is not clear from the record whether the Corps actually removed limestone from the lake, but the Court of Claims, viewing the facts most favorably to the petitioner on the United States' motion for summary judgment, considered the case "on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area" (Pet. App. 8a n.6).

complaint claimed a right of compensation for limestone taken from other areas of Florida and used for the construction of the Cross Florida Barge Canal.

On October 22, 1975, the Court of Claims granted the motion of the United States for summary judgment with respect to Count I (Pet. App. 1a-10a). The court held that all submerged property within a navigable body of water is subject to a servitude in favor of the federal government's dominant interest in navigation (*id.* at 5a) and that the levee in Lake Okeechobee was built by the federal government in aid of navigation (*id.* at 6a). Accordingly, the court concluded that petitioner was not entitled to compensation either for the loss of the opportunity to mine the limestone under or near the levee or for the use of such limestone by the United States in reconstructing the levee. Count II of the complaint, relating to the use of limestone from sources other than Lake Okeechobee for the construction of the Cross Florida Barge Canal, was remanded to the trial division of the Court of Claims for further proceedings. Subsequently, at petitioner's request, the court extended the time within which to seek rehearing on the Count I claim until 30 days after the court's decision on Count II.

On March 4, 1980, petitioner filed a motion for rehearing regarding Count I on the ground that this Court's decision of December 4, 1979, in *Kaiser Aetna* v. *United States,* 444 U.S. 164, required the Court of Claims to modify its decision.[4] The motion for rehearing was denied by the Court of Claims on June 13, 1980 (Pet. App. 11a-14a).

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[4]At the time petitioner filed its rehearing motion, Count II had not yet been decided, and that count is still pending before the Court of Claims. No issue concerning Count II is involved in this petition.

## ARGUMENT

Petitioner has not challenged the correctness of the initial decision of the Court of Claims as of the time it was issued. Rather, petitioner contends that this Court's subsequent decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), requires reversal of the Court of Claims' holding. However, *Kaiser Aetna* did not repudiate or undermine the principles relied on by the Court of Claims, and further review is unwarranted.

1. The facts and issues in *Kaiser Aetna* were entirely distinguishable from those in this case. There, a developer had converted a privately owned fishpond into a marina by means of substantial dredging and filling, including the deepening of the channel connecting the pond to Maunalua Bay and the Pacific Ocean. The Corps of Engineers was notified of the proposed work but advised the developer that no permits were needed. When the marina was completed, the developer charged a fee for its use and excluded the public at large. The Corps contended that the marina was a navigable waterway of the United States and that the public therefore had a right of access (444 U.S. at 166-169).

The Court framed the issue in *Kaiser Aetna* to be whether, "when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the 'navigational servitude' of the Federal Government * * * [and thus subject to a] public * * * right of access to what was once petitioners' private pond" (444 U.S. at 166). The Court rejected the government's contention "that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost * * * the right to exclude others" (444 U.S. at 176). Rather, finding that the pond "has always been

considered to be private property under Hawaiian law" and that "the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water" (444 U.S. at 179), the Court concluded "that petitioners' improvements to Kuapa Pond [had not] caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to them" (444 U.S. at 169).

In contrast to the pond at issue in *Kaiser Aetna,* Lake Okeechobee is, and ever since the admission of Florida to the Union has been, a navigable water of the United States. It was neither owned by petitioner nor made navigable through petitioner's efforts. Thus, petitioner cannot lay claim to "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others" (*Kaiser Aetna, supra,* 444 U.S. at 176). Moreover, no activity of the petitioner with respect to the lake was ever acquiesced in by the Corps of Engineers; to the contrary, the Corps has steadfastly, and with court sanction (see note 2, *supra*), refused to allow petitioner to extract limestone from the bed of the lake.

It is well settled that a riparian owner's title to submerged lands

> is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

*Kaiser Aetna, supra,* 444 U.S. at 176, quoting *Scranton* v. *Wheeler,* 179 U.S. 141, 163 (1900). For this reason, the exercise of

> [t]he dominant power of the federal Government * * * is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

*United States* v. *Chicago, M., St. P & P. R.R.,* 312 U.S. 592, 596-597 (1941). Accordingly, "[w]hen the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone." *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799, 808 (1950). In view of this longstanding doctrine, petitioner had "ample notice * * * that [its] property is subject to a dominant public interest" (*ibid.*). See also, *e.g., United States* v. *Rands,* 389 U.S. 121, 123 (1967).

This Court's decision in *Kaiser Aetna* did not purport to overrule these established principles. Instead, the Court expressly noted that, because "the factual situation in [*Kaiser Aetna* was] so different from typical ones involved in riparian condemnation cases" (444 U.S. at 176), the conventional precedents in the area could not be applied "in a situation as different from the riparian condemnation cases as this one" (444 U.S. at 177). On that basis, the Court concluded in *Kaiser Aetna* that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to

a taking * * *" (444 U.S. at 178). Nothing in the *Kaiser Aetna* holding casts doubt on the foregoing principles upon which the Court of Claims relied (see Pet. App. 12a).

2. Petitioner also argues that *Kaiser Aetna,* by characterizing a " 'taking' question * * * [as involving] essentially ad hoc, factual inquiries" (444 U.S. at 175), demonstrates that the Court of Claims erred in deciding this case on summary judgment without conducting a trial. However, *Kaiser Aetna* creates no new procedural rights for litigants and does not undermine the Court of Claims' decision in any way.

Contrary to petitioner's suggestion, the Court of Claims, in ruling upon the government's motion for summary judgment, did consider all relevant factual as well as legal matters. The court, after evaluating the facts in the light most favorable to petitioner (Pet. App. 8a n.6), correctly found "that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice" and that petitioner "does not present enough to raise any factual issue which should be tried" (*id.* at 10a n.7). *Kaiser Aetna* did not alter the established summary-judgment procedures that were followed by the Court of Claims, and further review of the grant of summary judgment to the United States is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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